Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1909

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

. . . . . .

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

. . . . . .

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

. . . . . .

REPLY BRIEF

. . . . . .

Charles F. Moses
MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

COUNSEL FOR PETITIONER

No. 86-1909

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

. . . . . .

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

. . . . . .

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

. . . . . .

REPLY BRIEF

. . . . . .

Charles F. Moses
MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

INTRODUCTION 1

1. THE PLEA BARGAIN 1

   A. The Facts 3

   B. The Law 5

2. THE RECALCITRANT WITNESS 7

3. DEAD TIME 9

CONCLUSION 10

FILING AND SERVICE VERIFICATION 11

TABLE OF CASES

Federal Reserve Board v. Dimension Financial,
88 L.Ed.2d 691 9

McNally v. United States, No. 86-234
decided June 24, 1987 9

Miranda v. Arizona,
384 U.S. 436, 16 L.Ed.2d 694
86 S.Ct. 1602 6

Santobello v. New York,
404 U.S. 251, 30 L.Ed.2d 427,
92 S.Ct. 495 (1971) 5

Spevack v. Klein,
385 U.S. 511, 17 L.Ed.2d 574,
87 S.Ct. 625 5,6

State ex rel. Bennett v. Bonner,
123 Mont. 414
214 P.2d 747 (1950) 6

T.V.A. v. Hill,
437 U.S. 153, 57 L.Ed.2d 117
98 S.Ct. 2279 (1978) 9

United States v. Leon,
104 S.Ct. 3405
82 L.Ed.2d 677 8

United States v. Rojas-Contreras,
88 L.Ed.2d 537 9

United States v. Travis,
735 F.2d 1129,1132
(9th Cir. 1984) 1

INTRODUCTION

We have received the government's brief in opposition to the petition for writ of certiorari. Our impression is that it reflects an indifference to the "rights of man" as developed more than 200 years ago in our Constitution. Governmental domination or governmental authority seems to be the prevailing theme.

Furthermore, we seem to detect a certain assertion of insubstantiality of our claim. The government's brief finds no fundamental significance to that which we seek to present to the Court. May we respectfully suggest that it is all a matter of perspective.

The fair administration of justice, integrity of government, fair dealing and equal treatment under the law become the focal point of our presentation to the Court.

This reply brief seeks to point out the importance of this case and our argument follows:

1. THE PLEA BARGAIN

Central to this discussion are the principles set forth in the Ninth Circuit Court decision of February 27, 1987. There the Court held:

> "When a guilty plea rests in any significant degree upon a promise or agreement of the government, such promise must be fulfilled." See U.S. v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984).
>
> "In determining whether a plea agreement has been broken the Court must look to what was reasonably understood by the defendant when he entered his plea."

In other words, we must look at the circumstances that

are presented in an individual case to determine, from the defendant's perspective, whether there was a significant understanding or forebearance by the government in this case.

Let me recite two practical examples which delineate and demonstrate this issue in a common sense and logical manner. To repeat, it depends upon a person's perspective and that is what is important here.

1. The Crow Indian Tribe in Montana was placed on the Indian Reservation with the understanding that if they accepted this land within the exterior boundaries of the Reservation, it would be theirs forever and the government would forebear from taking any more land claimed by the government. Subsequently there was the ceded strip from the lands of the Crows for homesteaders and on other occasions, thereafter, land was simply taken from the Indians for government purposes until it reached its present size. Despite promises of forebearance, the government had the power and exercised the power to change the agreement or treaty between the parties despite the understanding or the inducement that the land would belong to the Indians forever. The Indian Claims Commission sought to remedy this situation by paying the Indians the value of the lands, subsequently taken, but at the date of the taking. It is granted that this was a sad state of affairs in the history of our government, but it represents the power of the federal government to exercise its sovereign authority regardless of Indian rights solemnly declared. No one can quarrel with this example.

2. In many cases in court a property settlement agree-

ment in a divorce case is entered into by the wife upon the condition that she will have custody of the minor children. She has the choice or option to take what the husband offers or face the pressure of an extended custody battle. She believes that the best interests of the children support such an agreement and the agreement is reached. Sixty days thereafter the husband applies to the court for a change of custody because the courts are open and everyone has access to the courts (and without any change in the conditions existing at the time of the agreement). He thus has the advantage of the reduced property settlement and the advantage of an extended custody battle started anew.

These are practical problems that confront lawyers not only in their daily practice but in dealing with the seven Indian Tribes in the State of Montana and the word, forebearance, is the critical factor. Even though the government has the power and agrees to forebear and not utilize that power, when this inducement is breached and the power is subsequently exercised, the government has the best of both worlds, without let or hinderance. This recitation raises the critical issues in this case for they are strikingly the same.

Let me approach our position with a new perspective but similar to that presented in the initial petition for writ of certiorari.

A. The Facts. This is not a case in which the facts are in dispute. The defendant has testified clearly and concisely in court as to his understanding of the plea negotiations and the options afforded to him. If you enter a plea you take your chances as to a maximum sen-

tence without recommendation by the government. (This is what he received.) The alternative was to testify against others (rat) and the prospect of a lesser sentence was available to him. Mr. Hoffman did not wish to testify against others and chose the former option and included a provision that he be permitted to serve his sentence in Canada. (He did not trust the U.S. government and this is a fair perspective in light of after events.)

The attorney for Mr. Hoffman has confirmed and corroborated this understanding of the plea negotiations. The attorney for the government who was the same for all these proceedings offered no denial. The Court recognized in its remarks and findings that these were the facts.

Accordingly, we have a situation here where there is no dispute and the evidence is simply without contradiction and overwhelming in Mr. Hoffman's favor.[1]

The government, however, seems to rely upon the inquiry conducted by the court at sentencing. (U.S. Br. p. 2) The trial judge at the contempt hearing also relied upon the fact that he did not have to accept the agreement between the parties. Obviously, once the second option had been accepted by Mr. Hoffman, the understanding of the government that they would forebear from calling him as a witness was not relevant to the inquiry. We are favored with an article in the Journal of

[1] It is not a case where there is a requirement of abuse of discretion as a standard of review because all of the facts found were undisputed.

American Adjudicature Society, December/January 1987, Vol. 70, #4, where there is an extensive analysis of judicial supervision of the guilty plea. That article points out the inappropriate questions asked by the court to determine whether there were any promises, threats or pressures other than the plea agreement that had been made. This was asked in only 32% of all cases. If the question had arisen in the instant case, then these issues would not have occurred. This, however, was not the defendant's fault. Accordingly, it is again appropriate to conclude that the factual circumstances here, the option, and the inducement are stark in their presentation, without any dispute.

B. The Law. With respect to the law, we simply assert that Santobello v. New York, 404 U.S. 251, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971) states the law that applies in this case. We do not believe that a judicial construction here is required and recite the following: The Supreme Court stated the problem with respect to the due accord given these protections for the people in the following way. In Spevack v. Klein, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625, the Court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be

> watchful for constitutional rights of the citizen, and against any stealthy encroachments thereon.' 116 U.S. at 635, 29 L.Ed.2d at 752."

The State of Montana has adopted a similar principle. In State ex rel. Bennett v. Bonner, 123 Mont. 414, 214 P.2d 747 (1950), the Court said:

> "It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be obsta principiis.' Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746. Obsta pricipiis, - resist the first beginnings. Do not let the tyranny of government get a start. 'In the question of power, then,' wrote Thomas Jefferson, 'let no more be heard of confidence in man, but bind him down from mischief by chains of the Constitution.'"

A most persuasive statement is contained in Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). This case, of course, established the Miranda rights which are well known, but even more significant, the Court made the following statement which places our criminal process in the proper perspective:

> "On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'"

In conclusion, we simply point out that the Court should recognize the issue of integrity of government, the fair administration of justice, fair dealing and due process. It is after all the only protection Mr. Hoffman has and these principles should not be subverted or wasted away.

One last comment deserves consideration. Where the facts and the law favor Mr. Hoffman then any opinion by the Court is not based upon a judicial decision but is based upon a personal judgment that seeks to eliminate these principles by judicial construction. It was, after all, Mr. Hoffman's understanding as to the finality of the proceedings in the United States by entry of his plea. NO MAN UNDER THESE CIRCUMSTANCES WOULD ELECT TO SUBJECT HIMSELF TO THE MAXIMUM SENTENCE WHEN HE COULD BARGAIN FOR LESS "KNOWING THAT HE WOULD HAVE TO TESTIFY ANY WAY." Thus, the argument of the government is reduced to its obvious absurdity.

2. THE RECALCITRANT WITNESS

Again the focus of this reply brief is based upon a different perspective than presented in each of the foregoing briefs by the government and by Mr. Hoffman. **18 U.S.C. Sec. 1826** provides for contempt upon refusal to testify "without just cause". The question to be resolved is the application of that standard to the case at bar. In ordinary terms, we have a standard which determines whether a good reason or proper cause exists which justifies any witness from refusing to testify. Let me cite two examples.

(a) The plea bargain agreement between the govern-

ment and Mr. Hoffman represents not only a plausible but good reason to refuse to testify. He does not have to be right in all events but simply to set forth a basis for his refusal to testify. Good faith such as cases in search and seizure cases and United States v. Leon 104 S.Ct. 3405, 82 L.Ed.2d 677, demonstrate that law enforcement has good reason or good cause to search even though they do not have to ultimately prove the guilt of the defendant. The issue is not only debatable as to the plea negotiations but all of the events, which is undisputed, points only one way.

(b) The issue of compelled statements affecting foreign jurisdictions is likewise important here. The law is obviously unsettled and the fear is real and substantial as demonstrated by cited cases. An article in the December issue of Champion points out this substantial issue and is attached as an exhibit here. It states more clearly that this issue is not only significant but represents good cause to be concerned about the ultimate outcome of this case. We find, therefore, that Mr. Hoffman was justified in expressing his concerns and had good reason for his position. It was done in a responsible manner and on reliance of counsel.

The statute, however, and the perspective of the statute is changed from that of a determination of good cause to one of compelling witnesses' testimony for governmental convenience. It is not a focus upon a good reason not to testify, or advice of counsel, or the validity of his position at that time; it is simply compelling testimony by confinement without regard to an inquiry as to the basis for his refusal to do so.

The practical circumstances compel this change in focus. Even if a witness has the best of reasons why he should not testify at the time, the government can compel such testimony on pain of contempt and incarceration. Simply put, they need the witness. In this respect, the statute does not mean what it says and the law is subverted.

3. DEAD TIME

We spend only a moment on dead time under the statute. The government relies upon the Bureau of Prisons Program Statement 5140.11 (1979), 28 C.F.R. 522.11(d), citing cases. What we have here is not an allegation of the statute as it is written, but a practical construction that there would be "no pressure on the witness to testify if he was already serving a sentence". Admittedly this is a practical solution because the witness must be pressured into testifying despite the statute and this language. The Court was confronted with just such a situation in T.V.A. v. Hill, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978) (the snail darter case). The Court was confronted with the same problem in McNally v. United States, decided June 24, 1987, No. 86-234. See also United States v. Rojas-Contreras, 88 L.Ed.2d 537 and Federal Reserve Board v. Dimension Financial, 88 L.Ed.2d 691. If we can secure a result by adding to the language of the statute, by subtracting language from the statute, by reading a conclusion into the statute, then such rules of judicial construction which have been universally condemned now hold sway. It is judicial activism at its best. As the Court has often said, Congress has the duty and responsibility to change the

law if a change is needed and not by judicial legislation or administrative rule making.

CONCLUSION

1. There can be no other understanding under the facts and the law from Mr. Hoffman's perspective that he would not be required to testify. A different forum such as a grand jury was simply irrelevant. Government integrity and the fair administration of justice is implicated here.

2. The statute for a recalcitrant witness requires a showing of good cause or a sufficient reason at that time for refusing to testify. It cannot be subverted into a means to compel the witness to testify on pain of incarceration without regard to good cause. This too subverts the statute.

3. Finally, dead time is a creation of the judiciary and not by the legislative statute but by virtue of judicial construction not giving meaning to the statute and its terms (or by administrative rule).

We think these issues are significant.

Respectfully submitted this 14th day of August, 1987.

MOSES LAW FIRM

Charles F. Moses

Charles F. Moses
Attorney for Appellant

FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHARLES F. MOSES, of legal age, being first duly sworn, on his oath, deposes and says that he is the attorney for appellant herein, and that he personally has deposited 40 copies of this reply brief in the United States Post Office in Billings, Montana, first class postage prepaid and affixed, and properly addressed to the Clerk of this Court, on the 14th day of August, 1987.

Affiant further states that this reply brief was at such time and place served by mail on the respondent United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies threof to:

Byron H. Dunbar
United States Attorney
Federal Building
Billings, MT 59101
Attention James E. Seykora
Assistant U.S. Attorney

Charles F. Moses

Subscribed and sworn to before me this 14th day of August, 1987.

Charlotte L. Sucas
Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires ~~4/9/1988~~ 1-31-89

the CHAMPION
OFFICIAL JOURNAL OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
DECEMBER 1986 VOL. X, NO. 10

What do You do When a Client Tosses the Murder Weapon on Your Desk?

see page 5

BEST AVAILABLE COPY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

BEHIND CLOSED DOORS

by David Rudolf and Thomas Maher

Thanks to Ferdinand and Imelda, the United States Supreme Court is now directly faced with the question whether the Fifth Amendment provides any protection from compelled statements that may incriminate the witness in a foreign country, but not in the United States. The Fourth Circuit ruled recently that members of the Marcos's family may not invoke the Fifth Amendment based solely upon a fear of foreign prosecution regardless of whether that fear is real and substantial (it is, as Fabian Ver recently learned), and a petition for a writ of certiorari is now pending. While the Supreme Court ponders whether the secret of Imelda's shoes warrants the protection of the Constitution, lower courts have been pondering the Supreme Court's ruling in *United States v. Mechanik*, ___ U.S. ___, 106 S Ct. 938 (1986), and the Tenth Circuit has decided that the Supremes did not mean what they said.

Fear of Foreign Prosecution

The question whether United States courts may force a witness to testify to matters that may incriminate the witness under foreign law has arisen with increasing frequency over the past few years. The increasing importance of the question stems from the "burgeoning business" of extraditing offenders to foreign countries, a practice that tripled between 1980 and 1984. Lauter, *There's No Place To Hide*, NATL L. J., November 26, 1984, at 1, 28. Despite the number of cases, there has been no clear resolution of the issue. The arrival of the Marcos clan, however, has provided an opportunity for the Supreme Court to address the issue in a clear fact situation.

The issue whether fear of foreign prosecution is sufficient basis for raising a Fifth Amendment claim was first presented to the Supreme Court in *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472 (1972). The Court, however, ducked the question after finding that Zicarelli had no "real and substantial" fear that testimony about his Cosa Nostra responsibilities in New Jersey would expose him to prosecution outside the United States.

After *Zicarelli*, most courts have assumed that the Fifth Amendment protects one threatened by prosecution in a foreign country. *See Mashuma v. United States*, 507 F.Supp. 131 (D. Alaska 1981) (Fifth Amendment protected Japanese sailors facing criminal charges in Japan for negligently grounding their ship in United States waters); *United States v. Trucis*, 89 F.R.D. 671 (E.D. Pa. 1981) (Fifth Amendment protects defendant from answering questions when government seeks to revoke naturalization based upon crimes in Latvia, thereby exposing defendant to possible foreign prosecution); *In re Cardassi*, 351 F.Supp. 1080 (D.Conn. 1972) (grand jury witness questioned about drug smuggling from Mexico protected by Fifth Amendment). Only the Tenth Circuit, in *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot sub nom. Parker v. United States*, 397 U.S. 96 (1970), held that the Fifth Amendment did not protect against compelled testimony concerning "acts made criminal by the law of a foreign nation." The strength of even this holding, however, was considerably undermined by the court's conclusion that the witness had no real fear that her testimony would be used against her in a foreign prosecution. The Tenth Circuit now seems to align itself with the circuits that offer protection if the fear of foreign prosecution is real. *In re Grand Jury Proceeding 82-2 (Nigro)*, 705 F.2d 1224 (10th Cir. 1982).

The focus of most litigation concerning a witness's refusal to testify because of a fear of foreign prosecution has therefore been whether the witness has a real and substantial fear that the testimony can and will be used by foreign prosecutors. This question turns upon two factors: the likelihood that the witness would be prosecuted in another country, and the likelihood that the compelled testimony would be used against the witness by the foreign prosecutors.

The analysis of the first factor has depended upon the court's view of foreign law. *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116 (2d Cir. 1982) (Fifth Amendment claim denied as Great Britain unlikely to prosecute for IRA activity in the United States), and the court's assessment of the level of interest a foreign prosecutor would have in the case. *In re Gilboe*, 699 F.2d 71 (2d Cir. 1983).

Analysis of the second factor has focused on the adequacy of protection against leaks to foreign countries offered by Rule 6 of the Federal Rules of Criminal Procedure and individualized protective orders fashioned by the courts. Most courts have been content with the level of protection offered by Rule 6(e)'s secrecy provisions. *See In re Baker*, 680 F.2d 721 (11th Cir. 1982) (per curiam); *In re Baird*, 668 F.2d 432 (8th Cir.), *cert. denied*, 456 U.S. 982 (1982). The confidence, however, has not been universal. In *Flanagan* the court examined the exceptions to non-disclosure under rule 6, the widespread incidence of grand jury leaks, and the number of situations in which litigants can obtain grand jury testimony, and determined that Rule 6(e) was not sufficient protection. Similarly, in *Cardassi*, the court was unwilling to assume that all law enforcement officials would abide by Rule 6(e).

Against this background the Fourth Circuit recently addressed the claims of Irene and Gregorio Araneta, daughter and son-in-law of Ferdinand Marcos in *United*

David Rudolf is a partner in the Durham, North Carolina law firm of Betkind and Rudolf, P.A. He is the chairperson of the ABA's Grand Jury Committee and serves on NACDL's Board of Directors.

Thomas Maher is a member of the firm.

States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986). The Aranetas arrived in the United States with the ex-president of the Philippines (and a plane load of valuables). The Aranetas were allowed to enter the country under advanced parole status pursuant to 8 U.S.C. § 1182(d)(5), which allows the Attorney General to return them to the Philippines if he determines that their presence no longer serves the public interest. After their arrival in the United States, the Solicitor General of the Philippines filed charges against the Aranetas, alleging that they had violated the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippines Penal Code. The Aranetas then received more bad news in the form of grand jury subpoenas requesting that they appear before a grand jury in the Eastern District of Virginia that was investigating corruption in arms contracts with the Philippines. The district court granted the government's motion for statutory immunity, and ordered the Aranetas to testify. They refused to do so, claiming that their testimony could be used against them in the Philippines. The district court rejected this claim and found the Aranetas in contempt.

The Fourth Circuit had no problem in finding that the Aranetas had a real and substantial fear that their grand jury testimony could be used against them in the Philippines. The United States and the Philippines were co-operating in the investigation of corruption in the Marcos regime, and the Attorney General had the power to return the Aranetas to the Philippines, where they had already been charged with criminal offenses. In addition, it was clear that the Aranetas' grand jury testimony would be relevant to the charges against them in the Philippines. Despite a detailed and strict order from the district court controlling the disclosure of the Aranetas' testimony, the Fourth Circuit was unwilling to assume that their testimony would not end up in the possession of Philippine prosecutors. The court noted that the government retained the option of petitioning for a court order allowing disclosure, and that inadvertent disclosure of the substance of the Aranetas' testimony was a real possibility.

The court then faced the constitutional issue, and determined that the Fifth Amendment offered no protection when the witness's only fear was that the compelled testimony would incriminate them in a foreign country. The court recognized that the Supreme Court had never directly resolved this issue, and relied instead upon the Supreme Court's line of decisions that eventually extended the Fifth Amendment's protection to testimony in a federal prosecution that would incriminate the witness under state law. Under the older cases holding that the Fifth Amendment applied only to the federal government, the privilege against self-incrimination had been held not to prevent the United States from compelling testimony that might incriminate the witness in a state prosecution. *United States v. Murdock*, 284 U.S. 141 (1931). Only when the privilege against compelled self-incrimination was applied to the states, *Knapp v. Schweitzer*, 357 U.S. 371 (1958), did the Supreme Court prevent federal prosecutors from extracting testimony that could be used by the state. *Murphy v. Waterfront Commission*, 378 U.S. 1594 (1964). The Fourth Circuit, relying on these cases, reasoned:

> From this history, we conclude that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination. . . . Since the Fifth Amendment would not prohibit the use of compelled incriminating testimony in a Philippines court, it affords an immunized witness no privilege not to testify before a federal grand jury on the ground that his testimony will incriminate him under Philippine law.

794 F.2d at 926.

The court observed that the Fifth Amendment serves two purposes: it preserves the adversarial nature of our system of justice, and it protects those accused of crime from "the moral hazards of self-incrimination, perjury, or contempt." *Id.* As to the goal of preserving our system of justice, the court believed that it would not be affected by the use of compelled testimony by a foreign government. As to the second, the witness still faced the choice of self-incrimination, perjury, or contempt, but the United States had done everything within its power to prevent this. The court, then, believed that rejection of the Aranetas' claim in no way undermined the purposes of the Fifth Amendment. The court specifically limited its holding, however, to cases in which the United States has not "inspired, instigated or controlled" the foreign prosecution, and in which the United States pursues the immunized testimony for legitimate purposes of its own.

The Fourth Circuit is unlikely to have the last word on this matter. Over the summer, then Chief Justice Burger granted the Aranetas a stay pending the Supreme Court's consideration of their petition for a writ of certiorari. Burger concluded that it was likely that certiorari would be granted,[1] as the Court had previously granted certiorari on the same issue in *Zicarelli* and then failed to resolve the issue. Burger also believed that, based upon dictum in *Murphy v. Waterfront Commission*, there was a fair possibility that the Supreme Court would reverse the Fourth Circuit. *Araneta v. United States*, (United States, July 19, 1986), reported in 39 CRIM. L. REP BNA 4109.

Based upon the pending certiorari petition in *Araneta*, Justice Stevens granted a stay in a similar case arising out of the Seventh Circuit. *Mikutaitis v. United States*, 40 CRIM L. REP 4002 (Sept. 17, 1986). In *Mikutaitis* the witness had refused to testify at a civil deposition in a denaturalization proceeding in which the government sought testimony concerning his cooperation with the Nazi government. The Seventh Circuit found that the district court's order sealing the deposition testimony was sufficient protection, and did not reach the question whether the Fifth Amendment offered any protection. Justice Stevens found that whether a sealing order was sufficient protection was an open question that would likely be reviewed by the full court.

Should the Fourth Circuit's view prevail, some interesting issues remain for counsel representing a witness who legitimately

---

1. Time has shown Justice Burger to be a poor prophet. On October 20, 1986, after this column was written, the Supreme Court denied the petition for a writ of certiorari. *Araneta v. United States*, 86-172 (United States Oct. 20, 1986). Counsel must now deal with the Fourth Circuit's opinion as the last word for now.

fears that his testimony will be used by a foreign government. Under the Fourth Circuit's analysis, the application of the Fifth Amendment depends upon whether both sovereigns are under the same obligation not to coerce incriminating testimony. In the case of federal and state prosecutors this is clearly true. The Fourth Circuit did not address the question whether the same result applies when the foreign prosecutor also operates under a similar constraint imposed by that country's constitution or other law. The court implies that it will not, and that the federal prosecutor will only be restrained when the second sovereign is subject to the United States Constitution, which a foreign government never is. The court, however, did not directly deal with what affect, if any, a foreign government's own protection against compelled incrimination would have. The second issue that remains, of course, is to what degree the United States can be involved in the foreign prosecution before it can be said to have "inspired, instigated, or controlled" that prosecution. In the case of many international crimes, such as drug smuggling, there may be a fair amount of cooperation between the United States and the foreign government, which should be open to discovery in support of a motion to quash a grand jury subpoena.